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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

LEWIS VERNARD BLAKELY,

Defendant and Appellant.

F070186

(Super. Ct. No. BF106973A)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. Colette M. Humphrey, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Kane, J. and Smith, J.

INTRODUCTION

The Three Strikes Reform Act of 2012 (Proposition 36) permits third strike offenders serving indeterminate life sentences for crimes that are not serious or violent felonies to petition for resentencing. (Pen. Code, § 1170.126 et seq.) If a petitioning offender satisfies the statute's eligibility criteria, they are resentenced as a second strike offender "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (Pen. Code, § 1170.126, subd. (f).)

Following the enactment of Proposition 36, defendant, who was serving an indeterminate life sentence as a third strike offender, filed a petition for resentencing. The trial court, however, found defendant statutorily ineligible for resentencing and denied the petition. Defendant then appealed to this court (in case No. F067590) and, as it was unclear what evidence the trial court relied upon when determining defendant's eligibility for resentencing, we remanded the matter to the trial court with instructions to determine defendant's eligibility using only relevant, reliable, and admissible portions of the record of conviction.

Upon remand, the trial court again found defendant statutorily ineligible for resentencing. On appeal, defendant contends the trial court erred on remand by considering facts other than those stipulated to by the parties in advance of defendant's trial. We affirm.

FACTS

Defendant was charged by information with possession for sale of cocaine base (count 1; Health & Saf. Code, § 11351.5), felon in possession of a firearm (count 2; Pen. Code, § 12021, subd. (a)(1)), and possession of cocaine base while armed with a loaded firearm (count 3; Health & Saf. Code, § 11370.1, subd. (a)). The information also

alleged, among other things, that defendant had two prior strikes within the meaning of Penal Code section 667, subdivisions (c) through (j).

As part of a “slow plea,” counts 1 and 3 were dismissed and defendant proceeded with a bench trial on count 2. Prior to that trial, the parties stipulated to the following facts: (1) on June 4, 2004, defendant was in possession of a handgun, and (2) defendant had two prior strikes. At the conclusion of trial, the trial court found defendant guilty of being a felon in possession of a firearm and sentenced defendant as a third strike offender to a term of 25 years to life in prison.

Following the passage of Proposition 36, defendant filed a petition for recall of sentence. The trial court found defendant ineligible for resentencing, however, on the basis that his current sentence was imposed for a crime during which defendant was armed with a firearm. (Pen. Code, §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Defendant appealed the trial court’s denial and, as it was unclear what evidence the trial court relied upon when determining defendant’s eligibility for resentencing, we remanded the matter to the trial court with instructions to determine defendant’s eligibility using only relevant, reliable, and admissible portions of the record of conviction.

On remand, the trial court again found defendant ineligible for resentencing on the grounds his current offense was committed while armed with a firearm. In support of this finding, the trial court pointed to the transcript from defendant’s preliminary hearing, which contained testimony by a law enforcement officer stating defendant had admitted to not only possessing the gun, but carrying it and discharging it during a gun fight.

This appeal followed.

DISCUSSION

Defendant argues the trial court erred by considering the preliminary hearing transcript, as it was prohibited from considering any facts other than those stipulated to

by the parties for trial.¹ We disagree.

When determining the substance of a prior conviction, “trier of fact may look to the entire *record of conviction*[.]” (*People v. Reed* (1996) 13 Cal.4th 217, 223, italics in original.) If they are otherwise admissible, preliminary hearing transcripts are part of this record, and “the procedural protections afforded the defendant during a preliminary hearing tend to ensure the reliability of such evidence.” (*Id.* at p. 223.)

Here, there is no question the preliminary transcript in this case was admissible. While the document itself was hearsay, as was the law enforcement testimony within it, both instances of hearsay are subject to exceptions to the hearsay rule. First, the transcript itself is admissible as an official record. (Evid. Code, § 1280; *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350.) Second, the officer’s testimony was admissible hearsay as well, as he testified to an admission made by defendant himself, which is admissible as a party admission. (Evid. Code, § 1220.) Accordingly, the portion of the preliminary hearing transcript used by the trial court was a properly admissible portion of the record of conviction, and the trial court was authorized to reference it when making a determination on defendant’s eligibility for resentencing under Proposition 36.

Despite defendant’s claims to the contrary, there is simply no authority standing for the proposition that trial courts must be restrained to stipulated facts during a determination of eligibility for resentencing. Defendant’s sole authority is *People v. Houck* (1998) 66 Cal.App.4th 350, 356-357, where the Fourth District held a trial court is prohibited from considering facts that were not presented to the jury at trial when classifying prior convictions as strikes during sentencing. That case, however, is distinguishable from the instant case. In *Houck*, the trial court was classifying a felony for the purposes of imposing punishment. (*Id.* at p. 353.) As such, the defendant in that

¹ Defendant does not dispute that the preliminary transcript provides sufficient grounds to render him ineligible for resentencing, he merely contends the trial court was not permitted to consider the transcript during the eligibility determination.

case was entitled to far greater protections than in the instant case, where defendant merely sought relief from a validly imposed sentence. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1305-1306.) Under the facts of the instant case, we follow our Supreme Court's precedent in *Reed*, and find the trial court was free to reference admissible and reliable portions of the record of conviction when making eligibility determinations. As the transcript evidence at issue was admissible, part of the record of conviction as defined by *Reed*, and reliable due to "the procedural protections afforded the defendant during a preliminary hearing," we affirm. (*People v. Reed, supra*, 13 Cal.4th at p. 223.)

DISPOSITION

The order is affirmed.